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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-198

MORTON INTERNATIONAL, INC.,

Petitioner,

vs.

SOUTHERN PACIFIC TRANSPORTATION COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

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IN THE
SUPREME COURT OF THE UNITED STATES
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No.

MORTON INTERNATIONAL, INC.,

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vs.

SOUTHERN PACIFIC TRANSPORTATION COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

Petitioner Morton International, Inc. (hereinafter referred to as "Morton") prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Utah entered in the above-entitled case on March 14, 1972, which judgment became final upon denial of the petition for rehearing on May 8, 1972.

OPINIONS BELOW

The judgment of the District Court of Salt Lake County, Utah (See Appendix A) was not reported nor was there a written opinion. The opinion of the Utah Supreme

Court is reported at 495 P.2d 31 (1972), and is also set forth in Appendix B.

JURISDICTION

The judgment of the Supreme Court of the State of Utah was filed on March 14, 1972. A petition for rehearing and brief in support thereof was filed with the Supreme Court of the State of Utah on May 3, 1972. The petition for rehearing was denied on May 8, 1972. (See Appendix C.) This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTION PRESENTED

Whether the State of Utah through its Supreme Court, while acknowledging Morton's economic interest in the Great Salt Lake, has by improper application of state law deprived Morton of valid water rights vested under federal law prior to Utah's statehood and has thereby deprived Morton of any remedy to protect such economic interest, in violation of the due process clause of the 14th Amendment to the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment 14, Section 1:

> "All persons naturalized in the United States, are subject to the jurisdiction hereof, are citizens of the Unted States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."

Constitution of Utah, Article XVII, Section 1:

> "All existing rights to the use of any of the waters in this State for any useful or beneficial purpose, are hereby recognized and confirmed."

43 U.S.C. §661 (Section 9, Act of July 26, 1866):

> "Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.
>
> "All patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by this section."

Laws of the Territory of Utah, 24th Session, Chapter XX, Section 6 (1880):

> "A right to the use of water for any useful purpose, such as for domestic purposes, irrigating lands, propelling machinery, washing and sluicing ores, and other like purposes, is hereby recognized and acknowledged to have vested and accrued, as a primary right, to the extent of, and reasonable necessity for such use thereof, under any of the following circumstances: First—Whenever any person or persons shall

> have taken, diverted and used any of the unappropriated water of any natural stream, water course, lake, or spring, or other natural source of supply. Second—Whenever any person or persons shall have had the open, peaceable, uninterrupted and continuous use of water for a period of seven years."

STATEMENT OF THE CASE

For purposes of this petition, the facts contained in the following statement are undisputed.

Morton is a producer of salt from the Great Salt Lake, and sued respondent Southern Pacific Transportation Company (referred to herein as "Southern Pacific") in the District Court of Salt Lake County, Utah for damages and injunctive relief to remedy the injury to it resulting from Southern Pacific's wrongful and unreasonable construction of a causeway across the Great Salt Lake which has caused and is causing a progressive loss of dissolved sodium chloride from the waters of the south portion of the Great Salt Lake. (See complaint, Appendix D.)

Morton produces salt by diverting water from the Great Salt Lake to its land and plant which are located near Saltair, Utah, at the south end of the Lake. The plant represents an investment of millions of dollars. Morton and its predecessors in interest, to whose rights Morton succeeded, have been diverting water from the Great Salt Lake at the same location for the production of salt since 1888. Utah became a state in 1896.

Morton entered into an agreement with the State of Utah, dated September 17, 1954, under which Morton agreed to pay a production royalty computed at the rate of $.10 per ton of salt shipped. The agreement continues in effect so long as Morton produces salt.

In 1956 the Southern Pacific was granted an easement by the Utah State Land Board "for railroad purposes" running east and west across Great Salt Lake. (See Exhibit A to the complaint, Appendix D.) In 1959 Southern Pacific completed the construction of a causeway along this easement, which has the effect of dividing the Lake into separate but interconnected lakes, referred to herein as the "South Lake" and the "North Lake." Except for two fifteen foot wide culverts, the causeway is solid earth and rock fill. Approximately 90% of the Lake's inflow of fresh water flows into the South Lake. The elevation of the South Lake is about one foot higher than the elevation of the North Lake. There is a continuous migration of salt from the South Lake into the North Lake, with the result that millions of tons of salt are precipitating out of solution each year upon the floor of the North Lake due to the saturation of the North Lake brines. Prior to the construction of the causeway, the natural circulation of Lake water had kept the sodium chloride density approximately uniform throughout the Lake. The diminution of salinity of the South Lake has severely injured Morton and others. Thus far, Morton has suffered damages in excess of one million dollars and, since this condition is continuing and worsening, Morton will be forced to abandon its plant in the next few years unless the condition is corrected.

In the trial court, Southern Pacific moved for a summary judgment, memoranda were submitted by the parties and, after oral argument, Southern Pacific's motion was granted and judgment in its favor was entered. The trial court rendered no opinion and gave no reason for its ruling.

On appeal to the Supreme Court of the State of Utah, the judgment of the District Court was affirmed, and Morton's petition for rehearing was denied.

The federal question sought to be reviewed herein was first raised by Morton at the trial court level in its Memorandum in Opposition to Defendant's Motion for Summary Judgment where it was stated that Morton's water rights were vested under the existing federal and territorial laws in effect at the time those rights were obtained (footnotes omitted):

> "There is no question but that under Utah law the diversion and beneficial use of Lake waters by Morton's predecessors in the late 1880's vested valid water rights in them under federal[1] and territorial[2] statutes applicable before Utah's statehood, that these rights were confirmed at the time of statehood by Utah's constitution[3], and that thereafter the basic water appropriation statute (the Water Filing Act of 1903) and each subsequent amendatory act down to the presently effective Title 73 expressly recognized the continued validity of such rights.[4]" (R. 285-287).

In response to Southern Pacific's contention that the state statutes and case law did not support Morton's water right, Morton replied in its Response to Defendant's Reply Brief as follows:

> "The *Deseret Livestock Co.* case involved an action against the State Engineer wherein the court was asked to review the State Engineer's decision denying an application for appropriation of water from the Great Salt Lake. The decision involved the construction of a 1941 statute which provided that before the State Engineer could grant an application for the appropriation of waters from a lake which contemplated the recovery of salts and other minerals therefrom, the applicant was required to file a copy of a contract for the payment of royalties to the State of Utah. The Court held that under the statute, the Deseret Livestock Co. was not entitled to a water appropriation right unless and until

it had a contract for the payment of royalties on the salt to the State of Utah.

"The basic distinction between the *Deseret Livestock* case and this one is that at the time Morton's predecessors acquired their rights to appropriate water from the Lake, they did so under the terms of applicable statutes extant at the time (see Sec. 6, Ch. XX, Laws 1880; Compiled Laws 1888 (§2780, s6)). By diverting water from the Great Salt Lake and extracting salt therefrom as early as 1888, Morton's predecessors acquired vested rights to the water which could not be divested by statehood or subsequent acts of the State of Utah, such as the statute involved in the *Deseret Livestock Co.* case." (R. 317).

The trial court granted the Motion for Summary Judgment without giving any reason for the ruling. On appeal to the Utah Supreme Court, Morton again asserted its valid federal water rights obtained under federal law (footnote omitted):

"This part of Morton's brief will show that *Deseret Livestock* is not in point, and that the water right was validly acquired before Utah's statehood in accordance with the territorial and federal statutes effective at that time. The court decisions rendered contemporaneously with the acts of appropriation of Morton's predecessor establish a rule contrary to Southern Pacific's contention. The water right is a vested right of property entitled to the protection of the State and Federal Constitutions. (R. 370-371).

* * *

"A more basic difference lies in the laws governing the two cases. *Deseret Livestock* applies the present interrelated pattern of Utah's mineral leasing statutes and water statutes. On the other hand, the right now held by Morton vested many years before the State of Utah came into existence, under

laws effective in the Territory in the 1880's. A review of the development of these laws shows the validity of plaintiff's water use under then-applicable laws and decisions.

"When the initial water diversions were made by Morton's predecessors, the applicable federal statute (§9 of the Act of July 26, 1866; 14 Stat., 253; now 43 U.S.C. §661)[1] extended legal protection to the holder of a water right if such right was recognized by local custom, court decision or law, and authorized rights-of-way across public lands for the utilization of such right.

"Territorial legislation adopted in 1880 (Sec. 6, Ch. XX, Laws 1880) provided that water could be used '. . . for any useful purpose, such as for domestic purposes, irrigating lands, propelling machinery, washing and sluicing ores, and other like purposes,' and when so used, the vested water right thus acquired was given statutory protection. (R. 372-373).

* * *

"As the foregoing summary demonstrates, the law with respect to the acquisition of a water right in connection with the extraction of salt from the public domain prior to statehood was different from that applied in the *Deseret Livestock* case. The latter case defined interrelated state statutes and did not deal with vested water rights acquired prior to statehood. Accordingly, it may not be applied to deprive an appropriator under the applicable federal law prior to statehood of a vested water right acquired thereunder. To so construe and apply the *Deseret Livestock* case would result in an unconstitutional deprivation of Morton's vested rights in violation of the Fourteenth Amendment of the United States Constitution.

"The water rights acquired by Morton's predecessor during territorial times in accordance with the prevailing laws were vested rights and were con-

firmed and recognized by the Utah Constitution. Morton succeeded to these rights by the transfers of the properties to it. Sec. 60, Chap. 100, Laws, 1903; Sec. 73-1-11, U.C.A. 1953.

"As is observed in 1 Clark, Waters and Water Rights, p. 83:

> '. . . it is appropriate to note that each valid right to the use of water is a real-property right, under the protective aegis of federal and state constitutional guarantees which prohibit the deprivation of private property without due process of law.
>
> 'Whatever may be the effect of water doctrinal restraints on free transfers of water rights in a given area, this fact stands out clearly: the Fifth Amendment was added to the United States Constitution at the beginning of national history, and the Fourteenth Amendment was added in 1868; therefore, every subsequent statute, court decision, or acquired right of appropriation carried with it this fundamental constitutional inhibition regarding due process — an inhibition which applies to rights in land and other property as well as in water.'

"Based on all of the foregoing, Morton's water rights are rights of property which vested before this state came into existence. The Fourteenth Amendment of the United States Constitution would have extended protection to such a water right against any act of the new state or any person claiming under the state. However, as is shown above, from the outset the state explicitly recognized such rights, and the pattern of its laws has been so designed. Southern Pacific cannot be permitted to damage or harm such rights as it may choose." (R. 381-383).

With regard to this federal question, the Utah Supreme Court in its opinion affirmed the judgment below and

held that Morton ". . . has no right given by the State to divert the water at any *specific* point . . . has no vested claim to a beneficial use of the water. . . ." (495 P.2d at 33).

The opinion rendered by the Utah Supreme Court held that Morton's right to extract and process salt from the Great Salt Lake was valid, but, since it was a nonexclusive right and since Morton had no vested water rights, Morton was not entitled to any remedy for the improper dilution of the salt concentration caused by the Southern Pacific's causeway.

REASONS FOR ALLOWANCE OF THE WRIT

In the arid western states, water rights are of vital importance. The decision below, if permitted to stand, will have severe repercussions on all owners of water rights obtained under federal law as it allows states to alter or amend such water rights retroactively or, as in this case, do away with them entirely, in derogation of federal law.

The decision below is contrary to applicable decisions of this Court and is repugnant to the United States Constitution.

ARGUMENT

The basic issue presented here is whether Utah, through its courts, can deprive an owner of a vested property right acquired before statehood in accordance with applicable federal and territorial law through the simple expedient of retoactively asserting that the right never existed, by applying a prior state decision construing a 1941 Utah state statute.[1] The effect of such decision has been to render Morton remediless to protect its acknowledged economic

[1] *Deseret Livestock Co. v. State,* 110 Utah 239, 171 P.2d 401 (1946); Section 65-1-15, Utah Code Annotated 1953.

interest in the Great Salt Lake against the unreasonable, negligent and unwarranted action of the Southern Pacific resulting in the upsetting of the natural balance of the salinity of the Great Salt Lake. This unnatural change in the salinity balance has, as recognized by the Utah Supreme Court, affected not only Morton but also others having economic interests therein.[2]

In reaching the conclusion that Morton had no vested right, the court referred to an earlier Utah case[3] wherein it was held, based on a then-recent statute, that a person could not acquire a water right under Utah law unless he put the water to a beneficial use and that while extracting salt from the water was such a beneficial use, the water appropriator first had to have owned the salt. This conclusion in this earlier case did not involve the federal and territorial laws in effect in the 1880's when the initial water rights were acquired by Morton's predecessors, to whose rights Morton succeeded. The federal law before statehood was otherwise. Nevertheless, the Utah Supreme Court, contrary to existing federal law, improperly applied its earlier decision to the acquisition of water rights prior to statehood, saying that since Utah owns the salt in solution[4] Morton and its predecessors did not have a valid vested water right.

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[2]"We do this being mindful of the magnitude of the litigants' problems and interests. We would hope that if engineering-wise it would be practical and not inordinately costly, the litigants here, the amici curiae and all others having an economic interest in a constant and normal concentration of salinity in the lake, well might serve themeselves and the public welfare, if somehow, they could unite in an effort to maintain the waters of the lake in their natural saline state." (495 P.2d at 34; also at Appendix A8).

[3]*Deseret Livestock Co. v. State, supra.*

[4]This was only recently decided by this Court. *Utah v. United States,* 403 U.S. 9 (1971).

The applicable federal statute[5] extended legal protection to the holder of a water right if such right was recognized by local custom, court decision or law, and authorized rights-of-way across public lands for the utilization of such right.

Territorial legislation adopted in 1880[6] provided that water could be used ". . . for any useful purpose, such as for domestic purposes, irrigating lands, propelling machinery, washing and sluicing ores, and other like purposes," and when so used the vested water right thus acquired was legally protected.

A use of water in mining the public domain before enactment of a mining statute specifically authorizing such mining is a basis of a valid water right, and the priority date is the time of its earliest use. This is the holding of this Court in the landmark decision of *Jennison v. Kirk*, 98 U.S. 453 (1879). Morton's water right became clearly vested in accordance with these authorities and was expressly "recognized and confirmed" under the Utah Constitution.[7]

Not only has the Utah Supreme Court deprived Morton of a vested water right, but it is clearly in error as to the nature of that right. There is no question but that water rights in the western states, where the law of appropriation applies, have always been rights of real property and are governed by the law of real property with respect to

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[5]43 U.S.C. §661 (Section 9, Act of July 26, 1866); (See p. 3, *supra*, for text.)

[6]Laws of the Territory of Utah, 24th Session, Chapter XX, Sec. 6 (1880). (See pp. 3-4, *supra*, for complete text.)

[7]Constitution of Utah, Article XVII, Section 1; (See p. 3, *supra*, for text.)

transfer of title and other matters.[8] Use of a water right is limited to a fixed point of diversion, contrary to the Utah Supreme Court's holding that Morton has no right to divert water at any *specific* point and could, but for the expense involved, divert water from any point on the Lake where the salt in solution may exceed that in the South Lake. *Hague v. Nephi Irrigation Co.*, 16 Utah 421, 52 P. 765 (1898). Accordingly, Morton's water right is fixed at its present location appurtenant to Morton's plant at the south end of the Lake, and cannot be changed at will to avoid the effect of the causeway even if such change were economically feasible.

Such rights which have vested prior to statehood under the federal and territorial laws then in existence should come under the umbrella of protection against state action enunciated by this Court in *Borax Consolidated Ltd. v. City of Los Angeles,* 296 U.S. 10 (1935) and extended in *Hughes v. State of Washington,* 389 U.S. 290 (1967). In *Borax* this Court decided that the extent of ownership of land conveyed under a federal patent issued after statehood was to be determined by federal law, not state law. In *Hughes* this Court applied the *Borax* doctrine in holding that federal, not state law, governs the ownership of accretion land gradually deposited by the ocean on adjoining upland property conveyed by the United States prior to statehood. This Court should now extend the holding of these cases to water rights, reverse the judgment below, and confirm that Morton is the owner of vested water rights under federal law.

After stripping Morton of its water right, the Utah Supreme Court held that Morton's remaining economic

[8] 1 Wiel, Water Rights in the Western States, §283 (3rd ed. 1911); *Salina Creek Irrigation Co. v. Salina Stock Co.*, 7 Utah 456, 27 P. 257 (1891).

interest in the Lake was not worthy of protection. We are aware of no case in which the owner of an acknowledged economic interest in the subject matter has been denied any remedy to protect that interest. However, the constitutional right to some form of remedy has been discussed in *Gibbs v. Zimmerman,* 290 U.S. 326 (1933) where this Court stated:

> ". . . the appellant has no property, in the constitutional sense, in any particular form of remedy; all that he is guaranteed by the Fourteenth Amendment is the preservation of his substantial right to redress by some effective procedure." (290 U.S. at 332.)

Morton is entitled to a remedy to obtain redress for the injury to its property.

CONCLUSION

For the foregoing reasons we respectfully submit that this Petition for Writ of Certiorari to the Supreme Court of the State of Utah should be granted.

Respectfully submitted,

Frank A. Wollaeger
Hardin A. Whitney
Counsel for Petitioner

APPENDIX A

IN THE DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH

MORTON INTERNATIONAL, INC., a corporation,
Plaintiff,

vs.

SOUTHERN PACIFIC TRANSPORTATION COMPANY, a corporation,
Defendant.

JUDGMENT
Civil No. 196078

The above-entitled cause came on regularly to be heard before the Court, Honorable D. Frank Wilkins, District Judge, on the 12th day of May, 1971, upon motion by the defendant, Southern Pacific Transportation Company, for summary judgment. The plaintiff appeared by its attorneys, Hardin A. Whitney, Jr., John W. Horsley, Frank A. Wollaeger and Paul D. Frenz; and the defendant appeared through its attorney Haldor T. Benson and James R. Amschler. The Court heard arguments from counsel for both parties and both parties having submitted the matter to the Court and the Court having considered the affidavits, memoranda, and other documents on file and being fully advised in the premises,

NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment be and the same is hereby entered in favor of the defendant and against the plaintiff, and plaintiff's Complaint and the action herein

are dismissed with prejudice. It is further ordered that defendant be awarded its costs of suit herein.

MADE AND ENTERED this 25th day of May, 1971.

BY THE COURT
D. Frank Wilkins, *District Judge*

APPENDIX B

Morton International, Inc.,
a corporation,
Plaintiff and Appellant,

vs.

Southern Pacific Transportation
Company, a corporation,
Defendant and Respondent,
Hardy Salt Company, a corporation,
Amicus Curiae,
Solar Salt Company, a corporation,
Amicus Curiae.

No. 12557
FILED
March 14, 1972
L. M. Cummings,
Clerk

HENRIOD, Justice:

Appeal from a summary judgment dismissing Morton's complaint that asked for an injunction and damage incident to the defendant railroad's construction of a rock and earth causeway across part of Great Salt Lake pursuant to an easement granted by the State of Utah for such purpose in August 1956. Affirmed with costs to the railroad.

Morton and its predecessors have diverted lake waters to capture salt in solution by evaporative precipitation, since before 1903[1], the chop-off date after which appropriation of water for a beneficial use, had to filter through the State Engineer by formal application and hearing. Other companies, including amici curiae, Hardy Salt Co. and Solar Salt Co., enjoy similar histories. Morton's point of diversion has been and is at the south end of the lake approximately 30 miles south of the railroad's causeway, which for practical purposes separates the lake into a North and a South lake connected only by two 15-foot openings, causing the South Lake, into which flows essentially fresh water, amounting to 90 per cent of the total intake, to be

one foot higher, with a resulting flowage northward through the openings causing a dilution of salt content in the South Lake waters and a corresponding increased salinity in the North Lake waters. It is this dilution about which this litigation revolves.

The dilution mentioned allegedly commenced after the construction of the causeway and, if true, certainly after a written agreement was executed in September 1954 between Morton and the State, to settle a legal action between them, and without prejudice to each's claims. In that agreement Morton was "to have the continuing right to appropriate, remove and divert water of and from Great Salt Lake for the purpose of extracting salt therefrom, provided, however that this agreement shall not be construed to relieve Morton from full compliance with Title 73, Utah Code Annotated 1953," requiring an application and certificate to appropriate water.

The reading of defendant's brief discloses certain objections and observations that make it sound like the defendant here is the State of Utah, — such as plaintiff's failure to conform to its agreement of September 1954 mentioned above, its diligence rights in the water reserved against the State, the right of the railroad to assert defenses being that of the State, whether the railroad is engaged in a public endeavor, whether plaintiff has rights based on its failure to have made application for appropriation under Titles 73 and 65-1-15, Utah Code Annotated 1953, and the like, — all and none of which we believe to be dispositive here, — and we so hold.

What we *do* think is important and dispositive here, is the question of who owns the salt in solution in the waters of the lake. Although there was some question about this important matter before 1946, there was none there-

after, since we held in a somewhat similar case[2] that "the salt . . . is contained within Great Salt Lake, which is a navigable body of water. Because it is a navigable body of water its bed belongs to the state subject to the control of Congress for navigation in commerce. . . . It is our opinion that the state as the owner of the beds of navigable bodies of waters is entitled to all valuable minerals in or on them," — such conclusion being affirmed and established by the U.S. Supreme Court in the most recent decision of June 6, 1971[3]. Plaintiff cites many Territorial and State statutes having to do with the right to *use* water. Its only claim to ownership of the salt is by "silent acquiescence" of public authorities, with resulting "riparian" rights. Such claim is without merit.[4]

The reason we think that ownership of the salt is of primary import here is that plaintiff asserts an ownership in the salt in solution in the waters of the lake by virtue of its continued appropriation of part thereof. This thesis does violence to the concept and authorities mentioned in the next preceding paragraph, and indulges the assumption that plaintiff not only had an ownership interest in the salt solution and the bed of the lake to the exclusion of the State as long as its agreement with the State persisted, — possibly in perpetuity according to such contract, — but as to many others having agreements with the State to divert the water and extract the salt therefrom, as prevails with respect to the amici curiae mentioned herein. It is obvious that plaintiff's right to divert and precipitate the salt is a nonexclusive right, and that no matter what you call it, — a diligence right, a license, a profit a prendre, a lease, or a contract to sell, — the right is circumscribed by the provisions of Title 65-1-15, U.C.A. 1953, reserving to the State the salt in the water, "to be *sold* by the state land board *only* upon a royalty basis." The plain-

tiff's agreement with the State of September 1954, among other things, provides for and requires the payment of so much per ton for salt processed.

The State owning the salt and plaintiff having but a nonexclusive right to extract and process it, the basic question remains as to whether construction of the railroad's causeway, which concededly diluted the water of its salt content in the so-called South Lake, created a compensable claim against the railroad in favor of plaintiff, concededly damaged in the sense that dilution of the water it diverts will cost more in the salt reduction process. We think there is no compensable claim here because plaintiff has no exclusive right against the State or others to the salt or the water from which it is converted, has no right given by the State to divert the water at any *specific* point. It can do so at any available point along the lake, either south or north of the causeway, has no vested claim to a beneficial use of the water,[5] has filed no claim for mineral rights, and could, but for the expense involved, divert water as well from any point on the lake where the salt in solution may exceed that in the South Lake.

If the plaintiff, under such circumstances had a compensable claim against the railroad, it would have a claim also against all others having contracts to divert water for salt production, such as the amici curiae here, for interference with its right to take the water from the lake. Its theory would contemplate a guaranteed mean saturation point to be accomplished by the State, by other nonexclusive diverters, administrators of waters flowing into the lake, and perhaps others, with an adjunctive either express or implied warranty by the State that the public, state-owned waters of Great Salt Lake, could be used for no purpose whatever, affecting the public weal, for private contract, leasing to others, regulation of traffic thereon by Congress,

or otherwise, if the result threatened the dilution of the waters that plaintiff chooses to divert in its business. We are of the opinion that the plaintiff could not contend that the considerable rise in the lake level that has occurred in the past few years which would appear also to be dilutive of the salt water, would give rise to a compensable claim against the State.

The Great Salt Lake is the property of Utah subject only to regulation of navigation by Congress. The State has given the railroad a non-exclusive right to build the causeway, which right does not prevent the State from granting some other road such a right, just as it does not prevent the State from giving other persons or companies rights similar to Morton's.

Although plaintiff's complaint alleges it is a third-party beneficiary under the State's contract with the railroad because the easement was granted subject to a provision that the railroad would compensate surface owners and lessees for damage during construction and operation of the causeway, no point on appeal was urged for the contention that plaintiff was a "surface owner," although a point was made in essence that it was a "lessee," — which latter we have said has no merit. We are not called upon to determine whether Morton is a "surface owner" or not, but we are constrained to observe that we think such appellation does not apply to those incidentally damaged by water dilution, but at least to damage of some tangible existing physical property or facility owned by anyone, whether he has rights to remove salt water or not.

The briefs extensively discuss contractual matters anent rights and duties between Morton and the State, which latter is no party to this litigation. We are not constrained to discuss or decide those issues here, but only between

Morton and the railroad inter se. In doing so we think the summary judgment was correct. We do this being mindful of the magnitude of the litigants' problems and interests. We would hope that if engineering-wise it would be practical and not inordinately costly, the litigants here, the amici curiae and all others having an economic interest in a constant and normal concentration of salinity in the lake, well might serve themselves and the public welfare, if somehow, they could unite in an effort to maintain the waters of the lake in their natural saline state.

WE CONCUR:

E. R. Callister, Jr., Chief Justice

R. L. Tuckett, Justice

A. H. Ellett, Justice

J. Allan Crockett, Justice

[1]Chap. 100, Laws of Utah 1903; Sec. 73-3, U.C.A. 1953.

[2]Deseret Livestock Co. v. State, 110 Utah 239, 171 P.2d 401 (1946).

[3]Utah v. United States, ... U.S. ...., 91 S.Ct. 1775, ... L.Ed. .... (1971).

[4]See footnotes 2 and 3.

[5]Deseret Livestock Co. v. Utah, supra, footnote 2, where it is said "The only manner in which water can be appropriated is by being placed to a beneficial use. The use of water for the precipitation of salt is such a beneficial use, and if appellant were seeking to appropriate water to carry salt *which belonged to it,* it would be placing the water to a beneficial use. . . . However, *appellant does not own the salt.*"

APPENDIX C

SUPREME COURT OF UTAH
SALT LAKE CITY, UTAH

May 8, 1972

OFFICE OF THE CLERK

Hardin A. Whitney, Esquire
Attorney at Law
800 Deseret Building
Salt Lake City, Utah 84111

Morton International, Inc.,
a corporation,
Plaintiff and Appellant,
vs.
Southern Pacific Transportation
Company, a corporation,
Defendant and Respondent,
Hardy Salt Company, a corporation,
Amicus Curiae,
Solar Salt Company, a corporation,
Amicus Curiae.

No. 12557

This day petition for rehearing denied; case remitted to Salt Lake County.

L. M. Cummings, Clerk

APPENDIX D

IN THE DISTRICT COURT FOR THE THIRD JUDICIAL DISTRICT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

MORTON INTERNATIONAL, INC., a corporation,
Plaintiff,

vs.

SOUTHERN PACIFIC TRANSPORTATION COMPANY (formerly Southern Pacific Company), a corporation,
Defendant.

Civil No. 196078
COMPLAINT

Plaintiff complains of defendant and for causes of action alleges:

I.

FIRST CAUSE OF ACTION

1. Plaintiff and defendant are both corporations qualified to do and doing business within the State of Utah.

2. Plaintiff is an owner of land on the south end of the Great Salt Lake and is actively engaged there in the business of extracting sodium chloride salt from the brines of the lake and refining, processing and selling said salt in Utah and surrounding states. Plaintiff and its predecessors have continuously conducted said business operations at such location since approximately 1891.

3. Plaintiff has invested millions of dollars in such plant and the related ponds and equipment in pursuit of said business operations and in the development of markets for its products.

4. Plaintiff has the right to extract sodium chloride from the Lake brines.

5. By instrument dated August 15, 1956, a copy of which is attached hereto as Exhibit "A," the Utah State Land Board, acting in behalf of the State of Utah, granted to defendant an easement for railroad purposes 2,900 feet in width across the Lake, as described in Exhibit "A."

6. In 1956, defendant commenced constructing an earth and rock-fill causeway across the Lake from Promontory Point to Lakeside following the course of the easement as described, which causeway was completed in 1959. Said causeway, which runs east and west and constitutes a dike dividing the Lake, has, in effect, created two separate lakes (herein called the "south lake" and "north lake"). The south lake contains approximately 60% of the Lake surface area and receives approximately 90% of the fresh water input into the total Lake.

7. Prior to the construction of the causeway, the natural condition of the lake, including the natural circulation, was such that the sodium chloride content thereof was approximately uniform throughout.

8. By constructing the causeway in the location and manner set forth above, defendant has obstructed and changed said natural condition, including its circulation, of the waters of the Lake, and as a direct and proximate result of said construction, the following conditions have occurred and are occurring:

a. Millions of tons of sodium chloride have mi-

grated, and now are migrating, each year from the south lake to the north lake, a substantial portion of which have precipitated and are precipitating out of solution on to the bed of the north lake due to the saturation of the north lake brines.

b. The south lake brines have been and are being increasingly diluted with respect to sodium chloride content.

c. The surface elevation of the south lake is approximately one foot higher than the surface elevation of the north lake.

9. As a result of the above conditions created by the construction of the causeway, plaintiff has, since 1967, suffered damages in excess of $1,000,000, is suffering, and will suffer substantial damages due to the steadily increasing dilution of the sodium chloride content of the south lake brines being received at its plant, which damages include the costs of the acquisition and installation of additional ponding facilities, pumping facilities, additional maintenance and other operating costs, and loss of profits due to the decrease in production of sodium chloride despite said increased investment. Such damages will increase each year to the point where plaintiff will suffer the loss of its total business investment at the Great Salt Lake unless such conditions are remedied.

10. A significantly greater flow of brine, from south to north and north to south through the causeway, to the total depth of the Lake, is neccessary to reverse the present trend of the lessening concentration of sodium chloride in the waters south of the causeway, and a major opening in the causeway is required to provide the circulation of brines needed to prevent the continuing deposition of salt north of the causeway and to prevent the continual lessen-

ing of concentration of sodium chloride in the waters south of the causeway.

11. The easement granted by the Utah State Land Board, a copy of which is attached hereto as Exhibit "A," was granted by the State of Utah to defendant on the express condition, set forth therein, that "grantee agrees to compensate surface owners or lessees for all damages done during construction of the railroad and during its subsequent operations" which condition was intended for the benefit of third persons, including plaintiff, owning or leasing lands on the Lake, and created a direct contractual obligation on the part of defendant to plaintiff.

12. In breach of its agreement under the terms of said easement to compensate surface owners for damages due to the construction of the causeway, defendant has wrongfully refused and continues to wrongfully refuse to acknowledge its said contractual obligations to plaintiff, although due demand has been made therefor.

II.

SECOND CAUSE OF ACTION

13. Plaintiff incorporates the allegations of paragraphs 1 through 10 in this Second Cause of Action by reference, as though more fully set forth herein.

14. By virtue of the construction and maintenance of the causeway, the defendant has wrongfully caused, is wrongfully causing, and will continue to wrongfully cause the taking, carrying away of, and wasting of the sodium chloride in the brines of the south lake, so as to interfere with plaintiff's right to extract this sodium chloride.

15. Since 1966, plaintiff has advised the defendant of the growing effect of the causeway on the circulation

and on the chemical properties of the Lake and of the anticipated adverse effect on plaintiff's business. Plaintiff subsequently has demanded that defendant take whatever steps would be necessary to prevent any further interference with plaintiff's business of extracting sodium chloride salt from the brines of the south lake. The defendant has refused to take any action regarding plaintiff's demands.

16. Plaintiff's remedy at law is inadequate as to defendant's continuing and future wrongful taking and interference with plainitff's mineral and extraction rights in the Lake.

III.

THIRD CAUSE OF ACTION

17. Plaintiff incorporates the allegations of paragraphs 1 through 10 in this Third Cause of Action, as if more fully set forth herein.

18. As a result of the above conditions created by the construction of the causeway plaintiff has, since 1967, suffered, is suffering and will suffer substantial interference and invasion of its business of extracting sodium chloride from the brines of the Lake.

19. Defendant, by failing to consider and take measures to cure the effect of the causeway on the circulation and on the chemical properties of the Lake, acted in an unreasonable manner in the engineering and construction of the present causeway which does not provide for adequate circulation throughout the Lake so as to maintain its natural condition.

20. Since 1966, plaintiff has advised the defendant of the growing effect of the causeway on the circulation and on the chemical properties of the Lake and of the antici-

pated adverse effect on plaintiff's business. Plaintiff subsequently has demanded that defendant take whatever steps would be necessary to prevent any further interference with plaintiff's business of extracting sodium chloride salt from the brines of the south lake. The defendant has refused to take any action regarding plaintiff's demands, and this refusal to remedy the effects, as described in paragraph 8, of the causeway on the Lake is unreasonable, and the maintaining of the causeway in its present condition is unreasonable.

21. The causeway, as constructed by defendant, constitutes a private nuisance.

22. Plaintiff remedy at law is inadequate as to defendant's continuing and future wrongful interference with plaintiff's extraction rights.

IV.

FOURTH CAUSE OF ACTION

23. Plaintiff incorporates the allegations of paragraph 1 through 10 in this Fourth Cause of Action, as if more fully set forth herein.

24. Plaintiff extracts salt by diverting Lake waters into a system of evaporating ponds, where by evaporation the impounded waters reach a level of sodium chloride saturation; the waters are then conducted to other ponds in which the sodium chloride precipitates out, there to be harvested later; the remaining waters then are returned to the Lake.

25. Such use of water is a beneficial use.

26. Plaintiff's right to use Lake waters entitled plaintiff to divert, at its accustomed place, water of a quality substantially similar to that which it and its predecessors

have delivered into its ponding systems since its plant and works were constructed.

27. The construction by defendant of its causeway has markedly diluted the sodium chloride content of the waters of the south lake, and this results in wrongful damage to plaintiff's water rights.

28. Plaintiff's remedy at law is inadequate as to the future damages to its water rights in the lake.

WHEREFORE, plaintiff demands:

1. Judgment against defendant, together with interest and its costs, for damages to date and for projected future damages until the wrongful activities are remedied as prayed for herein.

2. An injunction restraining defendant from interfering with plaintiff's right to remove brine from Great Salt Lake, and compelling defendant to provide such opening or openings in the causeway as will restore the salinity of the south lake to the level it was prior to the erection of the causeway.

3. Such other and further relief as to this Court deems just, proper and equitable.

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PLAINTIFF'S ADDRESS
Saltair, Utah

EXHIBIT A

GRANT OF EASEMENT

Re: R/W-427

The State Land Board, acting in behalf of the State of Utah, in consideration of the sum of THREE THOUSAND NINE HUNDRED THIRTY FIVE AND 54/100 ($3,935.54), hereby grants to the SOUTHERN PACIFIC COMPANY, an easement for railroad purposes over and upon the following described tract of land. Said easement being 2900 feet in width, the center line of which is described as follows:

Commencing at the point of intersection of the easterly line of Lot 2, Section 22, Township 6 North, Range 9 West, Salt Lake Base and Meridian, with the original located center line of main track of the Central Pacific Railway Company at Engineer's Station "D" 3216+68, that is distant North 32°03′30″ East 2971.8 feet from the southwest corner of the southeast quarter of said Section 22; thence South 88°46′ East, along said center line, 24743 feet, more or less, to a point at Engineer's station "D" 3464+11.14 and the actual point of beginning of the center line to be described; thence easterly, from a tangent that bears South 88°46′ East, along a Talbot transition spiral curve to the left (the degree-of-curve thereof increased directly as the distance along said spiral from its point of beginning and changes at a rate of 1° for each 235 feet and chord of said spiral bears South 89°38′53″ East 352.47 feet) a spiral ditsance of 352.50 feet to a point of compound curve; thence easterly an northeasterly on a curve to the left having a radius of 3819.75 feet (chord of said curve bears North 75°41′24″ East 1705.45 feet) an arc distance of 1719.93 feet to a point of compound curve;

thence northeasterly on a Talbot transition spiral curve to the left (the degree-of-curve thereof decreases directly as the distance along the spiral from its point of compound and changes at a rate of 1° for each 235 feet and chord of said spiral bears North 61°54′33″ East 352.47 feet) a spiral distance of 352.50 feet to a point; thence North 60°08′48″ East, tangent to last said spiral at last mentioned point, 427.00 feet to a point; thence northeasterly from a tangent which is last described course, on a Talbot spiral curve to the right (the degree-of-curve thereof increases directly as the distance along the spiral from its point of beginning and changes at a rate of 1° for each 235 feet and chord of said spiral bears North 61°01′41″ East 352.47 feet; a spiral distance of 352.50 feet to a point of compound curve; thence northeasterly and easterly on a curve to the right having a radius of 3819.75 feet (chord of said curve bears North 75°41′24″ East 1705.45 feet) an arc distance of 1719.93 feet to a point of compound curve; thence easterly on a Talbot transition spiral curve to the right (the degree-of-curve thereof decreases directly as the distance along the spiral from its point of compound and changes at a rate of 1° for each 235 feet and chord of said spiral bears North 89°28′15″ East 352.47 feet) a spiral distance of 352.50 feet to a point in a line parallel with and distance 1500 feet northerly, measured at right angles, from the easterly prolongation of said center line of main track of the Central Pacific Railway Company; thence South 88°46′ East, tangent to last said spiral at last mentioned point and along said parallel line 56437.79 feet to a point; thence easterly, from a tangent which is last described course, on a Talbot transition spiral curve to the right (the degree-of-curve thereof increases directly as the distance along the spiral from its point of beginning and changes at a

rate of 1° for each 235 feet and chord of said spiral bears South 87°53′07″ East 352.47 feet) a spiral distance of 352.50 feet to a point of compound curve; thence easterly and southeasterly on a curve to the right, having a radius of 3819.75 feet (chord of said curve bears South 73°13′24″ East 1705.45 feet) an arc distance of 1719.93 feet to a point of compound curve; thence southeasterly on a Talbot transition spiral curve to the right (the degree-of-curve thereof decreases directly as the distance along the spiral from its point of compound and changes at a rate of 1° for each 235 feet and chord of said curve bears South 59°26′33″ East 352.47 feet) a spiral distance of 362.50 feet to a point; thence South 57°40′48″ East, tangent to last said spiral at the last mentioned point, 400.0 feet to a point; thence southeasterly, from a tangent which is the last described course, on a Talbot transition spiral curve to the left (the degree-of-curve thereof increases directly as the distance along the spiral from its point of beginning and changes at a rate of 1° for each 235 feet and chord of said spiral bears South 38°33′41″ East 352.47 feet) a spiral distance of 352.50 feet to a point of compound curve; thence southeasterly and easterly on a curve to the left, having a radius of 3819.75 feet chord of said curve bears South 73°13′24″ East 1705.45 feet) an arc distance of 1719.93 feet to a point of compound curve; thence easterly on a Talbot transition spiral curve to the left (the degree-of-curve thereof decreases directly as the distance along the spiral from its point of compound and changes at a rate of 1° for each 235 feet and chord of said spiral bears South 87°00′15″ East 352.47 feet) a spiral distance of 352.50 feet to a point distant 14.0 feet northerly, measured at right angles, from said center line of main track of Central Pacific Railway Company at engineer's Station "D"

4127+57.65, said Engineer Station being distant westerly 13000 feet, more or less, measured along said center line, from the west line of the southeast quarter of Section 25, Township 6 North, Range 6 West, Salt Lake Base and Meridian.

Should said grantee, its successors or assigns abandon the use, for railroad purposes, of said premises or any part thereof, the easement herein granted, as to the premises so abandoned, shall thereupon cease and terminate. It is also an express condition of this easement that Grantee shall determine whether the width of this easement may be reduced after construction is completed, and if so, Grantee shall surrender such parts of the premises as may not be necessary to its use.

It is a further condition of this grant that Grantee shall hold the State harmless from any and all claims arising against the state by reason of Grantee's use or operations over and across the premises herein described, and Grantee agrees to compensate surface owners or lessees for all damages done during construction of the railroad and during its subsequent operations.

IN WITNESS WHEREOF, the State of Utah through and by its State Land Board has caused these presents to be signed and sealed this 16th day of August, 1956, by the Executive Secretary of the State Land Board of the State of Utah, duly authorized by a resolution of the State Land Board under date of April 20, 1956.

STATE OF UTAH
STATE LAND BOARD
By: /s/ Lee E. Young
Executive Secretary

APPROVED AS TO FORM:
E. R. CALLISTER
Attorney General
By: /s/ Joseph P. McCarthy

STATE OF UTAH }
COUNTY OF SALT LAKE } ss.

On this 16th day of August, 1956, personally appeared before me Lee E. Young, who being by me duly sworn did say that he is the Executive Secretary of the State Land Board of the State of Utah, and that said instrument was signed in behalf of the State of Utah by authority of a resolution of the State Land Board and that said Lee E. Young acknowledged to me that the State of Utah executed the same.

My Commission Expires:
8/4/58

/s/ Donald G. Prince
Notary Public
Residing: Salt Lake City, Utah

SUPPLEMENTAL GRANT OF EASEMENT

B/W-427

WHEREAS, on even date, the State Land Board has granted an easement to the SOUTHERN PACIFIC COMPANY for railroad purposes across the bed of the Great Salt Lake, and said Grantee requires additional easements during the period of construction, now therefore,

The State Land Board, acting in behalf of the State of Utah, hereby grants to the Southern Pacific Company the following easements:

1. An easement for a barge canal 2000 feet wide, the

center line of which is described as commencing at a point 1850 feet east of the northwest corner of Section 14, Township 6 North, Range 6 West of the Salt Lake Meridian, and running thence West 30° South 2½ miles to a point 2200 feet south of the northwest corner of Section 21, Township 6 North, Range 6 West of the Salt Lake Meridian.

2. An easement for a railroad haul track 100 feet wide, the center line of which is described as commencing on the right of way of the Southern Pacific Company 1700 feet south of the west quarter corner of Section 25, Township 6 North, Range 6 West of the Salt Lake Meridian; thence North 15° West 4½ miles to the northwest corner of Section 11, Township 6 North, Range 6 West of the Salt Lake Meridian.

3. An easement to stock-pile equipment and material and docks and shelters for the same in an area 500 feet adjacent to the east side of the barge canal above described and extending north 1000 feet and south 1000 feet from a point 1850 feet east of the northwest corner of Section 14, Township 6 North, Range 6 West of the Salt Lake Meridian, and 500 feet east from said point.

This grant shall be effective from the date hereof until grantee shall have completed construction of a new railroad across the Great Salt Lake or until December 31, 1963, whichever is sooner, and it is an express condition of this grant that grantee shall compensate the owners and lessees, for all damages done to the premises, and shall compensate the State of Utah for materials removed from state lands or other waste committed on the permises. Grantee shall also save the State harmless from any claims resulting from grantee's operations.

IN WITNESS WHEREOF, the State of Utah through

and by its State Land Board has caused those presents to be signed and sealed this 16th day of August, 1956, by the Executive Secretary of the State Land Board of the State of Utah, duly authorized by a resolution of the State Land Board under date of April 20, 1956.

APPROVED AS TO FORM
E. R. CALLISTER
Attorney General
By /s/ Joseph P. McCarthy

STATE OF UTAH
STATE LAND BOARD
By /s/ Lee E. Young,
Executive Secretary

STATE OF UTAH }
} ss.
COUNTY OF SALT LAKE }

On this 16th day of August, 1956, personally appeared before me Lee E. Young, who being by me duly sworn did say that he is the Executive Secretary of the State Land Board of the State of Utah, and that said instrument was signed in behalf of the State of Utah by authority of a resolution of the State Land Board of the State of Utah and that said Lee E. Young acknowledged to me that the State of Utah executed the same.

My Commission Expires:
8/4/58

/s/ Donald G. Prince
Notary Public
Residing: Salt Lake City, Utah

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-198

MORTON INTERNATIONAL, INC.,

Petitioner,

v.

SOUTHERN PACIFIC TRANSPORTATION COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

BRIEF FOR RESPONDENT IN OPPOSITION

Haldor T. Benson
James R. Amschler
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Counsel for Respondent

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-198

MORTON INTERNATIONAL, INC.,

Petitioner,

v.

SOUTHERN PACIFIC TRANSPORTATION COMPANY,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

Respondent Southern Pacific Transportation Company (hereinafter "Southern Pacific") hereby prays that the Petition for Writ of Certiorari to the Utah Supreme Court filed by Morton International, Inc. (hereinafter "Morton") be denied by the Court.

OPINIONS BELOW

The judgment of the District Court of Salt Lake County, Utah was not reported nor was there a written opinion. The opinion of the Utah Supreme Court from which the Petition is taken is reported at 495 P.2d 31 (1972), and is set forth in Appendix A.

JURISDICTION

Morton has invoked this Court's jurisdiction under 28 U.S.C. §1257(3). Southern Pacific contends that jurisdiction on Writ of Certiorari is not present inasmuch as no substantial federal question is presented and the decision of the Utah Supreme Court rests upon adequate state grounds.

QUESTIONS PRESENTED

1. Whether the holding of the Utah Supreme Court was based upon any denial of vested water rights Morton claims to enjoy.

2. Whether Morton has any vested water rights to the water of the Great Salt Lake on the basis of appropriation prior to Utah's Statehood in view of the fact the Great Salt Lake is a navigable body of water which the United States held in trust for the State of Utah until its Statehood.

3. Whether a substantial federal question is presented if in fact the Utah Supreme Court did, under the particular facts of this case, deny Morton vested water rights which it claims to enjoy.

4. Whether the Utah Supreme Court's explicit holding that Morton's right to extract salt from the water of the Great Salt Lake was a non-exclusive right depriving Morton of a compensable claim against Southern Pacific constitutes an adequate, independent determination of state law rendering review by this Court improper.

STATEMENT OF THE CASE

Southern Pacific accepts the Statement of the case as stated by Morton in its Petition, but objects to the characterization of the holding of the Utah Supreme Court on page 10 thereof because, contrary to Morton's inference, the Utah Supreme Court did not base its holding on the absence of vested water rights on the part of Morton.

Said decision was based upon the finding of the non-exclusive nature of Morton's right to withdraw salt from the water of the Great Salt Lake (hereinafter the "Lake") and the legal conclusions resulting from that determination, with the issue of vested water rights being dictum and not necessary to the holding in the case.

ARGUMENT

I.

THE DECISION OF THE UTAH SUPREME COURT DOES NOT REST UPON DENIAL OF MORTON'S PURPORTED VESTED WATER RIGHTS.

Morton's argument in support of its Petition is based upon the assertion that the Utah Supreme Court's decision depriving it of a cause of action against Southern Pacific was grounded upon its denial of the vested water rights Morton sought to establish on the strength of the fact its predecessors in interest diverted water from the Lake for the purpose of recovering the salt therefrom prior to Utah's Statehood in 1896.

A careful reading of the decision (See Appendix A) reveals that the decision was actually based upon the facts that the State owned the minerals contained in the water of the Lake, that the right to extract salt therefrom granted to Morton by the

State was non-exclusive in nature, and that said right of extraction did not guarantee Morton a specific saturation point. From those determinations the Court ruled that Morton had no cause of action against anyone who might affect the salinity of the water of the Lake.

The Utah Supreme Court specifically discussed several of Southern Pacific's contentions, among them its reference to "its (Morton's) diligence rights in the water reserved against the State" and stated that "all and none of which (including the diligence rights issue) we believe to be dispositive here — *and we so hold.*" (R. 354) [Emphasis added]

The Court then stated that "what we do think is important and dispositive here, is the question of who owns the salt in solution in the waters of the lake." (R. 354) It went on to reason that since the cases of *Deseret Livestock v. State,* 110 Utah 239, 171 P.2d 401 (1946) and *Utah v. United States,* —U.S.—, 91 S.Ct. 1775 (1971) conclusively determined ownership of the bed of the lake and the minerals contained in the bed and the water thereof to be in the State of Utah, Morton's right to the salt depended upon the rights thereto it had obtained from the State of Utah.

From there it went on to hold that under State law, Morton's rights to the salt were non-exclusive in nature, and that it followed that Morton had no cause of action against Southern Pacific, the State of Utah, or other salt extractors for any diminution of the salt content in the water of the Lake.

Morton concurred with this view in its Petition For Rehearing and Brief In Support Thereof wherein it stated:

> In essence, this Court's decision is that Morton's right to extract and process salt from Great Salt Lake

waters is valid, but, since it is a non-exclusive right, Morton is not entitled to a remedy for dilution of the salt concentration caused by the Southern Pacific, the holder of another non-exclusive right from the State.

Morton's attempt in its Petition to base the Utah Supreme Court's decision upon a denial of vested water rights purportedly obtained by its predecessors in interest under federal and territorial law misstates the actual holding. Morton was not denied any rights obtained under federal law or protected by the Fourteenth Amendment to the Constitution of the United States by the Utah Supreme Court's decision.

This being the case, Southern Pacific submits that no question exists which would give this Court jurisdiction on a Writ of Certiorari.

II.

IF THE UTAH SUPREME COURT DID IN FACT DENY MORTON VESTED WATER RIGHTS:

A. THE COURT WAS CORRECT IN ITS JUDGMENT

B. DENIAL OF MORTON'S WATER RIGHTS DOES NOT RAISE A SUBSTANTIAL FEDERAL QUESTION WHICH THIS COURT NEED DECIDE.

Although it is clear that the Utah Supreme Court's decision does not rest or rely upon any denial of Morton's vested water rights, Southern Pacific submits that even should the decision be construed to do so: (1) such a decision is clearly correct and (2) that any such denial does not raise a substantial federal question which would require the granting of Morton's Petition for Writ of Certiorari.

A. THE COURT WAS CORRECT IN ITS JUDGMENT.

Morton's claim to vested water rights in the Great Salt Lake is grounded in diligence rights it claims its predecessors in interest enjoyed prior to Utah's Statehood in 1896.

More specifically, Morton claims its diligence rights under Section 9, Act of July 26, 1866, now 43 U.S.C. §661 and on the Laws of the Territory of Utah, 24th Session, Chapter XX, Section 6 (1880) (p. 3 of Morton's Petition). However, it is clear that Morton has no rights under those acts because: (1) The Act of 1866 does not apply to navigable waters and (2) the laws of 1880 provide for diversion only for a beneficial use, and diverting water from the Lake for the exclusive purpose of removing salt therefrom (whether before or after Utah's Statehood) has been held not to be such a beneficial use in *Deseret Livestock v. State, supra.*

The ability of the federal government to grant rights in federal lands and the water contained thereon is, of course, based upon ownership of the land and the water in question. In other words, the federal government couldn't grant rights in water contained on land it didn't own. As stated in *Howell v. Johnson,* 89 Fed. 556 (C.C. Mont. 1898):

> Being the owner of these lands, it (the federal government) has the power to sell or dispose of any estate therein or any part thereof. The water in an *innavigable* stream flowing over public domain is a part thereof, and the national government can sell or grant the same, or the use thereof, separate from the rest of the estate, under such conditions as may seem to it proper. (p. 558) [Emphasis added]

That the Court in *Howell v. Johnson* was correct in assuming that only non-navigable waters on the public domain were subject to federal disposal stems from the established constitutional principle of equality of the states as enunciated by this Court in *Shively v. Bowlby,* 152 U.S. 1 (1893). In that case, it was held that:

> The new States admitted into the Union since the adoption of the Constitution have the same rights as the original States in the tide waters, and in the lands below the high water mark, within their respective jurisdictions. (p. 26)

Morton's public lands argument must fail, therefore, because the beds of navigable bodies of water were never public domain, but were held in trust for the future states. Since the federal government couldn't (except under the limited circumstances outlined at page 48 of *Shively v. Bowlby, supra*) grant rights to the beds of such navigable waters, it couldn't grant rights in the waters on or in them. In so holding, the Court in *Shively v. Bowlby* stated at pages 49 and 50 that:

> The Congress of the United States, in disposing of the public lands, has constantly acted upon the theory that those lands, whether in the interior, or on the coast, above high water mark, may be taken up by actual occupants, in order to encourage the settlement of the country; but that the *navigable waters and the soils under them, whether within or above the ebb and flow of the tide,* shall be and remain public highways; and, being chiefly valuable for the public purposes of commerce, navigation and fishery, and for the improvements necessary to secure and promote these purposes, *shall not be granted away* during the period of territorial government; *but* unless in the case of some international duty or public exigency, *shall be held by the United States in trust for the future States, and shall vest in the several States, when organized and admitted to the Union,* with all the powers and prerogatives appertaining to the older States in regard to such

> waters and soils within their respective jurisdictions, in short, shall not be disposed of piecemeal to individuals as private property, but shall be held as a whole for the purpose of being ultimately administered and dealt with for the public benefit by the State, after it shall have become a completely organized community. [Emphasis added]

Because Utah had the same rights as the original states with regard to navigable waters, it had the right to determine what constituted a beneficial use of those waters. In *Deseret Livestock v. State, supra,* the Utah Supreme Court determined that diversion of water from the Great Salt Lake for the purpose of removing minerals therefrom was not a beneficial use unless the person diverting the water owned the salt contained therein.

Inasmuch as this Court held that the Great Salt Lake was navigable at Statehood, and that Utah owns the minerals contained in its water, *Utah v. United States, supra,* diversion of Lake waters by Morton's predecessors for the sole purpose of removing salt therefrom was not for a beneficial purpose because those predecessors did not own the salt contained therein.

To uphold Morton's contention would be to deny Utah the equal rights it obtained upon entry into the Union contrary to the constitutional rights guaranteed it when it became a State. Southern Pacific submits that this is untenable and that the decision of the Utah Supreme Court must be sustained and the Petition by Morton denied.

B. ANY DENIAL OF MORTON'S WATER RIGHTS DOES NOT RAISE A SUBSTANTIAL FEDERAL QUESTION WHICH THIS COURT NEED DECIDE.

It is an established principle that in order for this Court to grant a Petition for Writ of Certiorari, petitioner must present a substantial federal question for review, and that failure to do so, even though federal rights may have been denied, is cause for denial of the Petition. *Palmer Oil Co. v. Amerada Corp.*, 343 U.S. 290 (1952); *Zucht v. King*, 260 U.S. 174 (1922).

Should this Court decide that the Utah Supreme Court did in fact base its holding on a denial of Morton's purported vested water rights acquired before Utah's Statehood, Southern Pacific contends that no substantial federal question is presented thereby inasmuch as such denial would apply only to Morton and the other companies extracting minerals from the lake under a set of unusual and highly individual circumstances.

Morton baldly asserts at page 10 of its Petition that if the Utah Supreme Court's decision is allowed to stand, "severe repercussions on all owners of water rights obtained under federal law" will result. Inasmuch as the Great Salt Lake is unique in that it is the only lake in the United States which has a mineral content great enough to make extraction of minerals therefrom economically feasible, the question of water rights and how they relate to ownership of the minerals therein is a legal question by definition restricted to the State of Utah and those who withdraw minerals from the water of the Great Salt Lake. This question can hardly be construed, therefore, to affect all those in the arid western states who hold vested water rights under federal law.

Therefore, Southern Pacific submits that Morton's Petition does not present a cognizable substantial federal question upon which to base the Court's allowing Morton's Petition for Writ of Certiorari to be granted.

III.

THE DECISION OF THE UTAH SUPREME COURT IS SUPPORTABLE AS A MATTER OF INDEPENDENT STATE LAW AND IS NOT SUBJECT TO REVIEW BY THIS COURT.

It is an established rule of law that a decision by a State court supportable as a matter of state law is not subject to review by this Court, even though the State court also (whether correctly or incorrectly) passed upon issues of federal law. *Murdock v. Memphis,* 20 Wall. 590, 636 (1874); *Berea College v. Kentucky,* 211 U.S. 45, 53 (1908); *Herb v. Pitcarin,* 324 U.S. 117, 125-126 (1944); *Maryland v. Baltimore Radio Show,* 338 U.S. 912, 917-920 (1950). Southern Pacific submits that the decision of the Utah Supreme Court is broad enough, without reference to the federal question raised by Morton, to sustain the judgment on the grounds of state law, precluding review by this Court of that decision. *Eustis v. Bolles,* 150 U.S. 364, 370 (1893).

The Utah Supreme Court stated the basis of its decision was as follows:

> We think there is no compensable claim here because plaintiff has no exclusive right against the State or others to the salt or the water from which it is converted, has no right given by the State to divert the water at a specific point. (R. 355).

Assuming arguendo that Morton had the vested water rights it claims to have based upon diversion prior to Utah's Statehood, the conclusion cited above would still preclude Morton's recovery because its rights to divert water would not grant it ownership to the salt, *Deseret Livestock Co. v. State, supra,* which means that the nature of the Royalty Agreement with the State of Utah would govern Morton's rights.

The Utah Supreme Court's holding was based upon state law construing a state contract, with the Court stating that the non-exclusivity thereof was the factor preventing recovery. No federal questions are involved in that decision, and the decision on this ground is clearly independent from any pronouncement by the Utah Supreme Court on the status of Morton's water rights.

Thus, even if this Court granted Morton's prayer for relief at page 13 of its Petition to "confirm Morton is the owner of vested water rights under federal law," the result would be the same inasmuch as the Agreement granting rights to remove salt from the diverted water has been held to be non-exclusive in nature thus depriving Morton of a cause of action herein.

Because the holding of the Utah Supreme Court squarely rests on state law interpreting the rights of a state contract, there are adequate independent state grounds upon which to sustain its judgment, irrespective of the Court's purported views on the validity of Morton's water rights.

Therefore, under established law, a Writ of Certiorari in this case should not be granted.

CONCLUSION

For the foregoing reasons Southern Pacific respectfully submits that Morton's Petition of Writ of Certiorari to the Supreme Court of the State of Utah should be denied.

Respectfully submitted,

Haldor T. Benson
James R. Amschler
Counsel for Respondent

APPENDIX A

MORTON INTERNATIONAL, INC., a corporation,
Plaintiff and Appellant,
vs.
SOUTHERN PACIFIC TRANSPORTATION COMPANY, a corporation,
Defendant and Respondent,
HARDY SALT COMPANY, a corporation,
Amicus Curiae,
SOLAR SALT COMPANY, a corporation,
Amicus Curiae.

No. 12557
FILED
March 14, 1972
L. M. Cummings, Clerk

HENRIOD, Justice,

Appeal from a summary judgment dismissing Morton's complaint that asked for an injunction and damage incident to the defendant railroad's construction of a rock and earth causeway across part of Great Salt Lake pursuant to an easement granted by the State of Utah for such purpose in August 1956. Affirmed with costs to the railroad.

Morton and its predecessors have diverted lake waters to capture salt in solution by evaporative precipitation, since before 1903[1], the chop-off date after which appropriation of water for a beneficial use, had to filter through the State Engineer by formal application and hearing. Other companies, including amici curiae, Hardy Salt Co. and Solar Salt Co., enjoy similar histories. Morton's point of diversion has been and is at the south end of the lake approximately 30 miles south of the railroad's cause-

way, which for practical purposes separates the lake into a North and a South lake connected only by two 15-foot openings, causing the South Lake, into which flows essentially fresh water, amounting to 90 per cent of the total intake, to be one foot higher with a resulting flowage northward through the openings, causing a dilution of salt content in the South Lake waters and a corresponding increased salinity in the North Lake waters. It is this dilution about which this litigation revolves.

The dilution mentioned allegedly commenced after the construction of the causeway and, if true, certainly after a written agreement was executed in September 1954 between Morton and the State, to settle a legal action between them, and without prejudice to each's claims. In that agreement Morton was "to have the continuing right to appropriate, remove and divert water of and from Great Salt Lake for the purpose of extracting salt therefrom, provided, however that this agreement shall not be construed to relieve Morton from full compliance with Title 73, Utah Code Annotated 1953," requiring an application and certificate to appropriate water.

The reading of defendant's brief discloses certain objections and observations that make it sound like the defendant here is the State of Utah — such as plaintiff's failure to conform to its agreement of September 1954 mentioned above, its diligence rights in the water reserved against the State, the right of the railroad to assert defenses being that of the State, whether the railroad is engaged in a public endeavor, whether plaintiff has rights based on its failure to have made application for appropriation under Titles 73 and 65-1-15, Utah Code Annotated 1953, and the like, — all and none of which we believe to be dispositive here, — and we so hold.

What we *do* think is important and dispositive here, is the question of who owns the salt in solution in the waters of the lake. Although there was some question about this important matter before 1946, there was none thereafter, since we held in a somewhat similar case[2] that "the salt . . . is contained within Great Salt Lake, which is a navigable body of water. Because it is a navigable body of water its bed belongs to the state subject to the control of Congress for navigation in commerce. . . . It is our opinion that the state as the owner of the beds of navigable bodies of waters is entitled to all valuable minerals in or on them," — such conclusion being affirmed and established by the U.S. Supreme Court in the most recent decision on June 6, 1971[3]. Plaintiff cites many Territorial and State statutes having to do with the right to *use* water. Its only claim to ownership of the salt is by "silent acquiescence" of public authorities, with resulting "riparian" rights. Such claim is without merit.[4]

The reason we think that ownership of the salt is of primary import here is that plaintiff asserts an ownership in the salt in solution in the waters of the lake by virtue of its continued appropriation of part thereof. This thesis does violence to the concept and authorities mentioned in the next preceding paragraph, and indulges the assumption that plaintiff not only had an ownership interest in the salt solution and the bed of the lake to the exclusion of the State as long as its agreement with the State persisted, — possibly in perpetuity according to such contract, — but as to many others having agreements with the State to divert the water and extract the salt therefrom, as prevails with respect to the amici curiae mentioned herein. It is obvious that plaintiff's right to divert and precipitate the salt is a nonexclusive right, and that no matter what you call it, — a diligence right, a license, a profit a prendre, a lease, or a contract to sell, — the right is circumscribed by the provisions of Title 65-1-15, U.C.A. 1953,

reserving to the State the salt in the water, "to be *sold* by the state land board *only* upon a royalty basis." The plaintiff's agreement with the State of September 1954, among other things, provides for and requires the payment of so much per ton for salt processed.

The State owning the salt and plaintiff having but a nonexclusive right to extract and process it, the basic question remains as to whether construction of the railroad's causeway, which concededly diluted the water of its salt content in the so-called South Lake, created a compensable claim against the railroad in favor of plaintiff, concededly damaged in the sense that dilution of the water it diverts will cost more in the salt reduction process. We think there is no compensable claim here because plaintiff has no exclusive right against the State or others to the salt or the water from which it is converted, has no right given by the State to divert the water at any *specific* point. It can do so at any available point along the lake, either south or north of the causeway, has no vested claim to a beneficial use of the water,[5] has filed no claim for mineral rights, and could, but for the expense involved, divert water as well from any point on the lake where the salt in solution may exceed that in the South Lake.

If the plaintiff, under such circumstances had a compensable claim against the railroad, it would have a claim also against all others having contracts to divert water for salt production, such as the amici curiae here, for interference with its right to take the water from the lake. Its theory would contemplate a guaranteed mean saturation point to be accomplished by the State, by other nonexclusive diverters, administrators of waters flowing into the lake, and perhaps others, with an adjunctive either express or implied warranty by the State that the public, state-owned waters of Great Salt Lake, could be used for no purpose what-

ever, affecting the public weal, for private contract, leasing to others, regulation of traffic thereon by Congress, or otherwise, if the result threatened the dilution of the waters that plaintiff chooses to divert in is business. We are of the opinion that the plaintiff could not contend that the considerable rise in the lake level that has occurred in the past few years which would appear also to be dilutive of the salt water, would give rise to a compensable claim against the State.

The Great Salt Lake is the property of Utah subject only to regulation of navigation by Congress. The State has given the railroad a non-exclusive right to build the causeway, which right does not prevent the State from granting some other road such a right, just as it does not prevent the State from giving other persons or companies rights similar to Morton's.

Although plaintiff's complaint alleges it is a third-party beneficiary under the State's contract with the railroad because the easement was granted subject to a provision that the railroad would compensate surface owners and lessees for damage during construction and operation of the causeway, no point on appeal was urged for the contention that plaintiff was a "surface owner," although a point was made in essence that it was a "lessee," — which latter we have said has no merit. We are not called upon to determine whether Morton is a "surface owner" or not, but we are constrained to observe that we think such appellation does not apply to those incidentally damaged by water dilution, but at least to damage of some tangible existing physical property or facility owned by anyone, whether he has rights to remove salt water or not.

The briefs extensively discuss contractural matters anent rights and duties between Morton and the State, which latter is no party to this litigation. We are not constrained to discuss or de-

cide those issues here, but only between Morton and the railroad inter se. In doing so we think the summary judgment was correct. We do this being mindful of the magnitude of the litigants' problems and interests. We would hope that if engineering-wise it would be practical and not inordinately costly, the litigants here, the amici curiae and all others having an economic interest in a constant and normal concentration of salinity in the lake, well might serve themselves and the public welfare, if somehow they could unite in an effort to maintain the waters of the lake in their natural saline state.

WE CONCUR:

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E. R. Callister, Jr., Chief Justice

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R. L. Tuckett, Justice

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A. H. Ellett, Justice

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J. Allen Crockett, Justice

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[1]Chap. 100, Laws of Utah 1903; Sec. 73-3, U.C.A. 1953.

[2]Deseret Livestock Co. v. State, 110 Utah 239, 171 P.2d 401 (1946).

[3]Utah v. United States, — U.S. ...., 91 S.Ct. 1775, ...L.Ed. .... (1971).

[4]See footnotes 2 and 3.

[5]Deseret Livestock Co. v. Utah, supra, footnote 2, where it is said "The only manner in which water can be appropriated is by being placed to a beneficial use. The use of water for the precipitation of salt is such a beneficial use, and if appellant were seeking to appropriate water to carry salt *which belonged to it*, it would be placing the water to a beneficial use. . . . However, *appellant does not own the salt.*"